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No. 99-0696

In the Supreme Court of the United States

AMERICAN GRAIN TRIMMERS, INC., and FRANK GATES-ACCLAIM,

Petitioners,

v.

OFFICE OF WORKERS' COMPENSATION PROGRAMS, and MARIAN JANICH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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ARGUMENT

Petitioners hereby submit their reply to the briefs in opposition filed by the Federal Respondent and by Respondent Janich.

1. REPLY TO BRIEF IN OPPOSITION BY THE FEDERAL RESPONDENT

The Federal Respondent argues that the decision below does not conflict with the decision of the First Circuit in *Bath Iron Works v. Director, O.W.C.P.*, 137 F.3d 673 (1st Cir. 1998). The First Circuit analyzed its case by noting that the Benefits Review Board placed an extreme hurdle in front of an employer attempting to rebut the presumption in §20. In the present case, the court below blessed the rejection of Dr. Carroll's opinions by the administrative law judge. The Federal Respondent accepts the semantics of the court below that it agreed with the administrative law judge in his determination of the quality of the opinions of Dr. Carroll. However, the Federal Respondent does not address the issue of whether the administrative law judge placed an extreme hurdle by making such an analysis when he was ruling on the question of law of whether the evidence was of a minimum quantum (*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255, n.8 (1982)), more than a mere scintilla (*Richardson v. Perales*, 402 U.S. 389, 401 (1971)), or enough to allow a reasonable mind to accept as adequate to support a conclusion (*Consolidated Edison v. N.L.R.B.* 305 U.S. 197, 229 (1938)). Certainly, Dr. Carroll's opinions fit within these definitions, and would have cleared the statutory hurdle.

As noted by the Federal Respondent, the majority of the court below required that the opinions of Dr. Carroll "ha[ve] the support of the substantial evidence in the record." Fed.Br. 12. This improper analysis appears to have been adopted by the Federal Respondent for a number of reasons. Initially, the question for the court below (as it was for the administrative law judge) was a question of law, i.e., whether the opinions of Dr. Carroll constitute substantial evidence. The overly restrictive definition of "substantial evidence" established by the Benefits Review Board, as noted by the administrative law judge, places the ultimate burden of proof squarely on the employer.

The second reason is that the Federal Respondent believes the rebuttal burden requires an employer to produce evidence that is "believed by the trier of fact . . ." Fed.Br.13. This is quite similar to requiring the employer rebut the burden by a preponderance. This cannot be what was envisioned by this Court when it enunciated the "reasonable mind" standard in *Consolidated Edison*. In fact, it is expressly contrary to the "reasonable mind" standard. The Federal Respondent thus proves the Petitioners' argument that the decision below is in conflict with the prior decisions of this Court. Also, contrary to the argument of the Federal Respondent, the court below did not misapply the proper legal standard. Rather, the court below ignored precedents of this Court.

The last reason for the improper analysis by the Federal Respondent is that it fails to square the definition below with this Court's interpretation of "substantial evidence" in *Steadman v. SEC*, (450 U.S. 91 (1981)). Weighing the evidence for its probity is not a

fact based question for the courts or the administrative bodies when determining whether relevant evidence is substantial under §20 of the Longshore Act. It is a question of law.

By ignoring *Steadman*, the Federal Respondent fails to account for the differences in the burdens on a party on review by the phrase "substantial evidence in the record" in §21 of the Longshore Act (33 U.S.C. §921) and "substantial evidence to the contrary" that is required to rebut the presumption within §20 of that act (33 U.S.C. §920). While Congress appears to have inartfully used the same wording in drafting the statute, the phrases clearly have significantly different meaning. The former phrase occurs in appellate proceedings before the Benefits Review Board and the various courts. It involves the analysis of whether the findings of fact by an administrative law judge have support in the record. Unfortunately, this is the analysis used by the court below in determining the issue of law of whether the employer's medical opinions were "substantial."

The use of the phrase in §20 applies to the interim evidentiary determination made by an administrative law judge during the course of a formal hearing in analyzing whether the presumptions have been rebutted. The determination is one of a quantity of relevant evidence, consistent with *Steadman*. The majority below and the Federal Respondent must reject this in order to maintain their positions on this question.

The Federal Respondent suggests in a footnote (Fed. Br.13, n.2) that the credibility or weighing of Dr. Carroll's opinions performed by the administrative law judge is not at issue. The Federal Respondent notes

that the doctor was found credible, but his opinions were rejected as being hedged or speculative. If an expert renders "credible" testimony, and the substance of the doctor's testimony was his medical opinions, it is logically inconsistent to suggest that the testimony is credible but those opinions are speculative or are otherwise defective. This position can only derive its genesis from shifting the ultimate burden of proof to the employer, so as to require the employer to refute all possibilities in the defense of the case. In such an analysis, the only way for an employer to rebut the presumption is to win the case outright. This is the position of the Benefits Review Board as demonstrated by its holding in the present case and elsewhere. This cannot be the intended consequence. Therefore, credible expert testimony that addresses the ultimate issue in a case must as a matter of law be sufficient to rebut the presumption.

Yet, despite the decision in *Bath Iron Works*, the Board continues its misapplication of the law, going so far as to continue to require employers to rule out all possibilities of a causal relationship between employment and injury. Fortunately, as did the First Circuit, the Fifth Circuit recently saw through this improper administrative burden to rebut the presumption. *Conoco, Inc. v. Director, O.W.C.P.*, 194 F.3d. 684 (5th Cir. 1999). Despite finding in favor of the injured worker, the Fifth Circuit was compelled to comment on the analysis of §20 utilized by the Benefits Review Board. "The language [of §20] does not require a 'ruling out' standard; indeed, the hurdle is far lower . . . To place a higher standard on the employer is contrary to statute and case law. We therefore unequivocally reject the

'ruling out' standard applied by the Board in this case." *id.* at 690. In the present case, the employer was compelled to "sever" the causal relationship. App.37 (ALJ), 27 (BRB). It would seem that the Fifth Circuit would also reject any burden on the employer to disprove all possible avenues of liability.

Finally, it is interesting to note that the position taken by the Federal Respondent in opposition to the grant of the Petition appears to be contrary to the duties imposed on the Director of the Office of Workers Compensation Programs. The Director is charged with various duties, including the obligation to protect the Second Injury Fund under §8(f) of the Act. 33 U.S.C. §908(f). Originally, in the litigation of this case, in the defense of the Fund, the Director opposed a finding of liability. App.45. The administrative law judge awarded benefits to the Claimant but provided protection to the employer through the fund. App.58-60. When the claim reached the Court of Appeals, the Director changed position and argued in favor of the finding of liability. The only justification for this switch is the continuation of the "single-minded compensate-the-employee goal" that permeates the Director's arguments. *Director, O.W.C.P. v. Newport News Shipbuilding and Dry Dock Co. (Harcum),* 514 U.S. 122, 132 (1995). This goal causes the Director to support the holdings of the Benefits Review Board that force employers to disprove all conceivable causes of liability in order to defeat a claim. This is evident from the position of the Federal Respondent in the present case and the holdings of the Board in the present case, *Bath Iron Works*, and *Conoco*.

2. REPLY TO BRIEF IN OPPOSITION BY RESPONDENT JANICH

The brief filed by Janich engages in fantasy by suggesting that the administrative law judge did not believe that §20 shifted the ultimate burden of proof to the employer, even though the administrative law judge appears to have authoritatively cited a Benefits Review Board decision so holding. Jan.Br.12

The argument of Janich cites a line of cases that follow the decision of the D.C. Circuit in *Swinton v. J. Frank Kelly*, 554 F.2d 1075 (D.C. Cir. 1976). Jan.Br. 11-12. This argument requires one to ignore or disregard this Court's holding in *Steadman*, and implies that the phrase "substantial evidence" under the Longshore Act means something different than it means in the other acts containing the same phrase. As argued previously, the entire body of administrative law cannot have varying interpretations of the same phrase. Nor can one administrative body persist in maintaining such a skewed interpretation.

Finally, Respondent Janich joins at the eleventh hour in attempting to discredit Dr. Carroll. It is disingenuous for Janich to imply that Dr. Carroll's opinions contain "a large quantity of obvious lies or nonsense." Jan.Br.13. The doctor's testimony was well within the range of opinions issued every day by qualified specialists in hearings, trials, and depositions on a daily basis, just as were the medical opinions in *Bath Iron Works*. Janich did not seek to strike the opinions of Dr. Carroll on the grounds that they contained lies or nonsense. Janich did not object to the opinions of Dr. Carroll on the grounds that the testimony did not contain competent expert opinions when it was submitted.

Rather, Janich recognized the validity of the testimony and struggled mightily to weaken the opinions of the doctor by use of treatises and extensive cross examination. The attempted use of treatises was rejected by the administrative law judge. App.44. The vigorous cross examination resulted only in the doctor making the admission that he would only be able to render speculative opinions in response to speculative questions. App. 68-69. Neither the administrative law judge nor the reviewing bodies should step in to say that the testimony of the doctor was flawed so badly that the opinions must be disregarded. Five reasonable persons on the Court of Appeals believed the opinions to be substantial evidence. The error occurred as a result of the improper analysis of the court below stemming from the use of an improper standard.

CONCLUSION

For the reasons set forth above and argued previously, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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